



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

JRE
Docket No: 734-97
4 October 1999

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: [REDACTED]
REVIEW OF NAVAL RECORD

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149 w/attachments
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that his naval record be corrected to show that he was transferred to the Temporary Disability Retired List, vice retired by reason of attaining maximum age.

2. The Board, consisting of Messrs. Lightle, Rothlein and Zsalman, reviewed Petitioner's allegations of error and injustice on 26 August 1999 and, pursuant to its regulations, a majority of the panel determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. Petitioner was born on 11 August 1932. He enlisted in the Navy on 7 May 1951, and served on active duty until his discharge on 22 November 1964. He was commissioned as an ensign, U.S. Naval Reserve, on 23 November 1964, with concurrent call to active duty. He remained on active duty, and received promotions in due course. He was promoted to captain, USN, on 1 October 1985. A Report of Fitness of Officers covering the 1 August 1992-12 August 1993 period, when he served as CO, Naval Hospital Pensacola, indicates that his performance was "superb". He was described as a highly intelligent and personnel oriented leader, who excelled in every endeavor. His reporting senior, a vice admiral, noted that Petitioner was a "remarkable manager", and a man of uncompromising

integrity and personal courage. In the admiral's opinion, "...Navy medicine will be hard tasked to replace an officer" such as Petitioner. Petitioner was evaluated by a medical board on 9 June 1994, and seventeen diagnoses were recorded, to include history of squamous cell cancer; status/post nasopharyngeal radiation therapy; interval gout; essential hypertension; primary hyperthyroidism; chronic otitis media; severe hearing loss; velopharyngeal insufficiency; tinnitus; sensory impairment; esophageal reflux; normochromic, normocytic anemia; mild renal insufficiency; incomplete right bundle branch block; type 2B hyperlipidemia; degenerative joint disease; and neurodermatitis. The medical board recommended that the matter be referred to the Central Physical Evaluation Board (CPEB for a determination of his fitness for duty. The Report of Fitness of Officers rendered on Petitioner for the 26 August 1993-24 June 1994 period, when he served as Deputy to the Chief of Naval Education and Training Force Medical Officer, is laudatory. The reporting senior noted that despite Petitioner's numerous medical problems, he had been an effective member of the Force Medical Office, and that it would be hard for Navy medicine to replace him when he retired in August 1994. Addenda to the 9 June 1994 medical board report were drafted on 11, 12 and 13 July 1994, by physicians specializing in dermatology, otolaryngology and gastroenterology, respectively. A urology addendum was forwarded to the PEB on 9 August 1994. On 29 September 1994, the Record Review Panel (RRP) of the PEB found Petitioner fit for duty. On 3 November 1994, he was advised by the Presiding Officer, PEB, that paragraph 2056, SECNAVINST 1850.4C, provides:

"When a member continued to perform the normal duties of his or her office, rank, grade or rating until commencing processing for non-disability retirement or separation, it shall be presumed that he or she was FIT FOR DUTY. This presumption can be overcome if it can be established by a preponderance of evidence that the member, in fact, was physically unable to adequately perform the duties of his or her office, rank, grade or rating even though he or she was improperly retained in that office, rank, grade or rating for a period of time; or, if an acute, grave illness or injury, or the deterioration of physical condition occurred immediately prior to or coincidentally with non-disability retirement or separation processing which rendered him or her UNFIT FOR DUTY."

The Presiding Officer further advised Petitioner that review of his case disclosed that he was not improperly retained on active duty, and that his condition was not an acute, grave illness or injury or a condition that has deteriorated immediately prior to or coincidentally with his non-disability separation or retirement processing. It was noted that he had performed the duties of his office, rank, grade, or rating until processing for retirement, and that the presumption of fitness had not been overcome by a preponderance of the evidence. Petitioner rejected the findings of the RRP, and requested reconsideration. He specified that if the reconsideration did not result in any change in the findings, he wanted a formal hearing. Although service members found fit by the RRP do not have the right to demand a formal hearing, a hearing may be authorized on a permissive basis. Although reconsideration of the RRP findings resulted in no change, he was granted a hearing.

d. Petitioner appeared before a hearing panel of the PEB on 26 January 1995, and

requested to be found unfit for duty and assigned a disability rating of 50%. He maintained that the provisions of paragraph 2056, SECNAVINST 1850.4C were inapplicable to him because he had been retained on active duty improperly. He testified, in effect, that he was diagnosed with adenocarcinoma of the oropharynx in June 1991, while serving as Commanding Officer (CO), Naval Hospital Pensacola, but received treatment for the cancer at the National Naval Medical Center (NNMC), Bethesda. The treatment was completed during October 1991, and thereafter he continued his duties as CO, Naval Hospital Pensacola. He testified he was not well and not adequately carrying-out his duties. He submitted a letter from a retired vice admiral who was his responsible line commander until September 1992. The admiral stated that he felt that Petitioner was not medically fit for future assignment in an active duty capacity as of September 1992. He did not, however, relieve Petitioner of command. Petitioner testified that when he was relieved of command in August 1993, which was one year earlier than scheduled, it was implied that he was being relieved because of inadequate performance. He acknowledged that he was not officially relieved for cause, and that he received satisfactory fitness reports and a Meritorious Service Medal as an end of tour award. He testified that upon his relief, he was transferred to a "non-job". He maintains that during October 1993, he asked three physicians to initiate medical boards. One of the physicians, Dr. T..., told him that if a medical board were held, he would be found fit for duty. Petitioner testified that he spoke to an official at the Bureau of Naval Personnel and was told that his mandatory retirement date was in June 1995. He stated that he did not know that he had to retire at age 62 in September 1994. He testified that the physician who conducted his pre-retirement physical examination in early 1994, felt that Petitioner would not be able to work full-time due to the sum total of his medical problems.

e. On 14 February 1995, the President, PEB, advised Petitioner that the hearing panel which evaluated his case by formal hearing on 26 January 1995 had found him fit for duty. The rationale of the hearing panel indicates that Petitioner's former line commander, who did not relieve Petitioner from command in September 1992, indicated by his actions then, as opposed to by his words several years later, that he believed Petitioner was fit for continued active duty and command. The hearing panel noted that his projected rotation date was June 1993, which indicates his relief in August 1993 was "on time". In addition, it was noted that Petitioner was transferred to a job with an official billet sequence code and job description. The hearing panel stated that there is no documentation supporting Petitioner's contention that any of the three physicians named by him felt that he had requested or required a medical board during October 1993. It was noted that the physician who conducted Petitioner's pre-retirement physical examination did not make a comment supporting Petitioner's statement that he would be unable to work full-time because of the effects of his conditions. The hearing panel concluded that paragraph 2056, SECNAVINST 1850.4C, was applicable, and that he was fit for duty.

f. On 2 March 1995, Petitioner submitted a Petition for Relief from Final Action to the Director, Naval Council of Personnel Boards (NCPB), in which he expressed his disagreement with the finding of fitness. He requested that he be found unfit and assigned

ratings of 30% for stricture of the esophagus, a 10% for chronic mastoiditis, eustachian tube dysfunction and hearing loss, 10% for degenerative joint disease, and 10% for laryngitis, for a combined rating of 50%. He contended, in effect, that it was the position of the PEB, under the terms of NCPB/PEB Policy Letter 1-93, that the presumption of fitness became applicable in his case on 1 January 1994, nine months prior to his mandatory retirement for age, because disability proceedings had not been initiated as of that date. Petitioner maintained that objective medical evidence clearly demonstrated that medical board reports should have been written before 1 January 1994, because of the severe residual effects of his cancer and treatment therefor. He pointed out that it was the objective state of his health, not his desires or efforts to obtain medical boards, which should have resulted in his being evaluated by a medical board. In his opinion, the hearing panel failed to consider or address his objective state of health as it was prior to 1 January 1994. He noted that during the August 1993-January 1994 period, he suffered from all of the conditions described in his medical board reports and addenda written after January 1994, and thus he should have had a board prior to January 1994. He submitted letters from three physicians to rebut the inference in the hearing panel's rationale that he was untruthful when he stated he had requested medical board from those physicians prior to January 1994. He also submitted an Officer Distribution Control Report dated 9 July 1993, which indicates that his mandatory projected rotation date was in 1995. That record and his discussion with Bureau of Naval Personnel officials led him to believe his mandatory retirement date was in 1995. He stated that he had an extremely difficult time dealing physically and emotionally with the limitations his conditions placed on him as he struggled to perform his duties as CO, Naval Hospital Pensacola. By the summer of 1993, however, he was no longer physically able to serve in that position, and his tour was cut short. He believes that medical boards should have been written shortly thereafter.

g. A letter from Captain F..., dated 11 February 1995, is to the effect that he tentatively diagnosed Petitioner with carcinoma in late May or early June 1991, while Petitioner was serving as CO, Naval Hospital Rota Spain. Captain F... next saw Petitioner during October 1991, at Naval Hospital, Pensacola, where Petitioner had assumed command, and where Captain F... was assigned to the Ear, Nose and Throat Department. Captain F... was surprised to see Petitioner, because in his experience (as an otolaryngologist) persons with carcinoma of the nasopharynx are usually declared unfit for duty and placed on the Temporary Disability Retired List until therapy has been completed and sufficient time has passed to see what the sequelae of the therapy will be and whether there will be any metastases. Captain F... stated that he suggested to Petitioner that a medical board be initiated at that time, "but he declined." Captain F... continued to see Petitioner as a patient until 1 October 1994, when Captain F... retired. During that time, Petitioner had numerous, expected, complications of radiation therapy, and Captain F... discussed the need for a medical board on many occasions with Petitioner. In 1993, Petitioner's ear infections, pain, and hearing loss became disabling and interfered with his performance of his duties. Due to circumstances beyond Captain F...'s control, he could not perform a medical board. Captain F... stated that in his opinion, Petitioner was not physically qualified because of his various medical conditions, and unable to satisfactorily perform the duties of his rank. Captain F...

Captain F... also noted that Petitioner's need for treatment disqualified him from deployment, duty overseas and isolated duty. In his opinion, Petitioner was an "eternal optimist" who kept thinking his symptoms would improve. In Captain F...'s opinion, Petitioner would continue to have symptoms with little or no change in the future, and he would not become fit for duty.

h. In a letter dated 1 February 1995, Captain N..., then Head of the Gastroenterology Department, Naval Hospital, Pensacola, indicated that during late 1993, he was planning to do a medical board on Petitioner. Due to unspecified circumstances beyond his control, the medical board had to be performed at the National Naval Medical Center. He noted that due to Petitioner's dysphagia, which required esophageal dilation on a monthly basis, he was not fit for "deployment, etc." In a letter dated 14 February 1995, Captain T..., of the NNMC Department of Otolaryngology and Head and Neck Surgery, stated, in effect, that he recalled discussing the possibility of a medical board with Petitioner during the August-September 1993 time frame when he saw Petitioner for an evaluation. At the time he felt a medical board was not necessary because Petitioner was performing his duties adequately. In retrospect, Captain T... felt that it was probably a mistake not to have performed a medical board (in August-September 1993) because Petitioner experienced the beginning of an extended period of mastoid infection around that time.

i. The Director, NCPB, denied the Petition for Relief from Final Action on 21 March 1995. Petitioner was released from active duty on 30 April 1995, and transferred to the Retired List the following day. He completed 44 years and 3 days of active duty service. On 11 June 1997, the Social Security Administration determined that he had been under a disability, i.e., unable to work, since 1 May 1995. On 26 July 1997, the Department of Veterans Affairs, determined that Petitioner was unemployable effective from 1 May 1995. The major components of the rating were a 50% rating for esophageal stricture with reflux and dysphagia, effective 1 May 1995; hearing loss rated at 20% from 1 May 1995, and 70% from 19 July 1996; heart disease rated at 30% from 1 May 1995; and 10% ratings for four additional conditions, for an overall combined rating of 100%.

j. Petitioner contends, in effect, that he asked Captain F.... to do a medical board during late 1993. Dr. F... agreed, but was not permitted to do so because of events beyond his control. Similarly, Dr. N.. also informed Petitioner that "events beyond his control would not allow him to do a medical board." Shortly thereafter, Petitioner was advised by his supervisor, the CNET Force Medical Officer, that when he went to the NNMC for his routine check-up, he would be scheduled for a retirement physical also. He later found out that a medical board would be accomplished by officers assigned to the NNMC. When he asked his supervisor what was going on, he was told that he was suspected of soliciting statements from individuals at the Pensacola Naval Hospital, and that he had become too involved in a problem Captain F... was facing concerning the review of his medical credentials. Petitioner states he gave Captain F... advice based on their friendship and not as a former commanding officer. Petitioner's supervisor also mentioned that he had seen [critical] letters about the commanding officer, and Petitioner strongly suspects that he was

being accused of writing the letters. He was advised that he was not allowed in Naval Hospital Pensacola except for official clinic visits, and then he was to take the most direct route to the clinic, and depart by the same route. He was told not to talk to anyone during those visits except the attending physician, and that the order applied to his whole family. Petitioner told the supervisor that the order was illegal as it pertained to his family, and that he could not be prevented from visiting the exchange located within the hospital, and that he would visit the post office if necessary. After completing his retirement physical during May 1994, the physician who performed the physical told him that based on all of his problems, a medical board was in order. After the medical board was written and forwarded to the PEB, he still had concerns about his retirement date, because he was approaching age 62 as well as the completion of thirty years of commissioned service. He maintains he was told by an individual in BUPERS his retirement would be "on later than" [sic] 30 June 1995. Subsequently, a Navy attorney assigned to CNET advised him that, by law, he would retire either the month following his sixty-second birthday, or 1 December 1994, the month following his completion of 30 years of commissioned service. Petitioner feels that even though he was not involved with "whatever was going on at Naval Hospital Pensacola", he could not get the two physicians who were treating him for his primary problems to do a medical board. He was advised that Dr. T... of NNMCMC, was his primary physician, even though all Dr. T... provided minimal care following (initial) treatment. Dr. F... was actually his primary physician. He maintains that he was told that another reason he could not have a medical board at Naval Hospital Pensacola was because, as a previous commanding officer, he "could/would" use his prior position to influence the physician to give him a "better medical board". He believes that reasoning is ridiculous, as he would never ask a physician to do anything unethical. He believes that the Surgeon General of the Navy was going to do everything in his power to remove him from the Navy, because Petitioner, as well as other commanders, "...caused him embarrassment in early 1993 due to lack of funds." He contends that the Surgeon General published a memorandum praising those who cooperated with him and stating that those "...of us who decided to go the other way would pay for it at a later day." He states he was recently told that personnel within BUMED played a role in "...getting me out of the Navy", but he is not at liberty to disclose the individual's name because he is still on active duty. He notes that a former CO, Naval Hospital, Great Lakes, was commissioned the same time Petitioner was, but was allowed to remain on active duty until 30 June 1995. He notes that comments have been made that he was performing his duties in a satisfactory manner; however, he submits statements from numerous former subordinates "...who think differently." In his opinion, if it had not been for his outstanding staff, he could never have completed his tour. He states that his job at CNET consisted of "basically doing nothing", and that he was not in an authorized billet. All of his "so-called duties" were assigned to a lieutenant commander after he "was accused of being involved in the hospital problem". He notes that all medical and dental billets at CNET have since been abolished. He relates the circumstances of a master chief hospitalman who elected to retire and then requested a medical board. That individual was found fit for duty based on the presumption of fitness, but that finding was ultimately reversed by the Director, NCPB, and he retired with a 40% rating. Petitioner was told by the master chief that their situations paralleled each others's, but the master chief "did not

have others involved with his situation. Justice for all." In closing, he states that he was treated unjustly when a medical board was not initiated in 1993, especially after two medical officers who had worked with his problems for more than two years knew he was no longer qualified to remain on active duty. He questions why, if a medical board could not be done at Pensacola, one was not done at that time at NNMCMC., and he asks why, after the medical board was finally done, did it take more than two months to obtain all of the necessary consults? He states "I gave forty-four (44) years of my life to the Navy, of which over forty-three (43) of it was to navy medicine. It is hard to believe that there is that much hate, especially in the upper levels of Navy medicine. It almost makes one feel as though a conspiracy has been committed against them".

MAJORITY CONCLUSION:

Upon review and consideration of all the evidence of record, a majority of the Board, consisting of Messrs. Lightle and Zs Salman, conclude that Petitioner was unfit to perform the duties of his office no later than October 1991, when he completed initial treatment for his cancer, and he should have been retired by reason of physical disability at that time. They believe he was able to satisfactorily perform his duties as CO, Naval Hospital Pensacola, only because of his optimism, perseverance and extreme devotion to duty, and the fact that he had an outstanding staff working and covering for him. They agree that his final billet at CNET was a sinecure, and his ability to perform satisfactorily in such a position does not establish that he was fit for duty. The majority note that Petitioner was required by law to retire no later than 1 September 1994, the month after he attained age 62. The majority was not persuaded that he that he was forced to retire prematurely, improperly received disparate treatment as compared to others similarly situated, or that he was victimized by the Navy or any of its officers or officials.

The majority concludes that the only condition which rendered Petitioner unfit for duty prior to his transfer to the Retired List was the esophageal stricture, and as that condition was relatively static for several years prior to his retirement, he should be permanently retired by reason of physical disability with a rating for that condition only, rather than transferred to the Temporary Disability Retired List.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was permanently retired by reason of physical disability effective 1 May 1995, pursuant to 10 U.S. Code 1201, with a 30% rating under VA code 7203.

- b. That the remainder of Petitioner's request for correction of his naval record be denied.
- c. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

MINORITY CONCLUSION:

Upon review of all of the evidence of record, a minority of the Board, consisting of Mr. Rothlein, concludes that Petitioner has failed to submit sufficient relevant evidence to demonstrate the existence of probable material error or injustice in his naval record. He rejects Petitioner's contentions that he was mistreated by the Navy medical establishment, and that review of his status by a medical board was unfairly delayed, as he believes those contentions are unsubstantiated. The minority member notes that the intent of disability statutes is to provide disability compensation to individuals whose careers are cut short by reason of physical disability, prior to their qualifying for length of service retirement. In his opinion, the presumption of fitness contained in SECNAVINST 1850.4C, paragraph 2056, which implemented a provision of DOD Directive 1332.18 of 25 February 1986, was designed for situations such as that in which Petitioner found himself at the end of his lengthy career. In this regard, the minority finds the statement of Captain F.... summarized in paragraph 3g, above, to be very significant. Captain F..., who was a long-time personal friend and subordinate of Petitioner concluded in 1991 that Petitioner should have a medical board at that time because of his cancer and the residuals thereof. Captain F... "offered" a medical board to Petitioner, who was Captain F...'s commanding officer. Petitioner declined the "offer", and, consequently, he was permitted to remain on active duty for several more years, until compelled to retire upon attaining age 62, despite his limited ability to perform his duties. In the minority's opinion, Petitioner bears the responsibility for the application of the presumption of fitness in his case because he used his position as a hospital commander to prevent the timely review of his case by the Disability Evaluation System in order to prolong his active duty career, with the intention of retiring by reason of physical disability at a later date.

In view of the foregoing, the minority concludes that it would not be in the interest of justice to grant any portion of Petitioner's request for correction of his record.

MINORITY RECOMMENDATION:

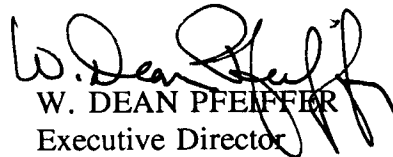
That Petitioner's application for correction of his naval record be denied.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder


JAMES R. EXNICIOS
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.


W. DEAN PFEIFFER
Executive Director

NOV 2 1999

Reviewed and approved majority conclusion and recommendation: *C. L. Tompkins*

CHARLES L. TOMPKINS
Deputy Assistant Secretary
of the Navy for Personnel Programs

~~Reviewed and approved minority conclusion and recommendation::~~